IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-906

UNITED AIR LINES, INC., *Petitioner,*

v.

HARRIS S. MCMANN, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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INTEREST OF THE AMICUS *

The Chamber of Commerce of the United States of America [hereinafter "the Chamber"] is a federation consisting of a membership of over thirty-six hundred (3,600) state and local chambers of commerce and professional and trade associations and a direct business membership in excess of sixty thousand one hundred (60,100). It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to ren-

* Consents of the parties to the filing of this brief have been obtained, and letters reflecting such consents are on file in the Office of the Clerk.

der such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant fair employment matters before this Court. *E.g., Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975); *Geduldig* v. *Aiello,* 417 U.S. 484 (1974); *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971)

The issue in this case, whether employees may be retired mandatorily pursuant to bona fide retirement plans, is of major interest to the Chamber's membership. The amount of money invested by the Chamber's members in pension plans and retirement systems is enormous. Many of the terms of those plans and systems would be invalidated or imperilled by the decision of the court of appeals in this case. Moreover, that decision would essentially deny all employers the option to reduce the mandatory retirement ages for their employees below 65 years, however substantial the benefits they provide.

These issues were also of great importance to the Chamber's members in 1967 when Congress was considering the legislation which is interpreted by the court below. As a result, the Chamber testified before both the Senate and House subcommittees.[1] In fact, the Chamber and others pointed out to both subcommittees the danger that this legislation might be interpreted in much the same manner as the court of appeals has interpreted it here. As a result, the bill was amended to make it explicit that age-related provisions (including mandatory retirement provisions) in pension, retirement, health and insurance plans would not be invalidated by the statute.

[1] *Hearings on S. 830 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare,* 90th Cong., 1st Sess. 105-44 (1967); *Hearings on H.R. 3651, H.R. 3768 and H.R. 4221 Before the General Subcommittee on Labor of the House Committee on Education and Labor,* 90th Cong., 1st Sess. 60-76 (1967).

Because a decision of this Court to deny the petition for certiorari would have a substantial adverse impact on the employee benefit plans of many of the Chamber's members, the chamber supports the petition for a writ of certiorari in this case.

QUESTION PRESENTED

What is the standard for determining whether a employee benefit plan which requires retirement of employees prior to age 65 is a "subterfuge to evade the purposes" of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* (1970) [hereinafter, "ADEA" or "the Act"], under section 4(f)(2) of the Act, 29 U.S.C. § 623(f)(2) (1970)?

STATEMENT OF THE CASE

The respondent, an employee of petitioner, United Air Lines, Inc., was terminated when he reached age 60 under an employee retirement plan which required all employees to retire at that age. Respondent filed an action claiming that his forced retirement violated the ADEA. The district court granted summary judgment for the petitioner because it considered the petitioner's action to be authorized under section 4(f)(2) of the ADEA, which states that, "[i]t shall not be unlawful for an employer . . . to observe . . . any bona fide employee benefit plan . . . which is not a

subterfuge to evade the purpose [of the Act]" 29 U.S. C. § 623(f)(2) (1970) [hereinafter, "section 4(f)(2)"].

The district court's decision was based largely on its finding, later stipulated, that petitioner's plan was "bona fide" and on the Fifth Circuit's decision in *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974), which held that Taft's adoption of its plan long before enactment of ADEA, eliminated "any notion that it was adopted as a subterfuge for evasion." 500 F.2d at 215.

On appeal, the Fourth Circuit reversed the district court [2] and explicitly rejected the decision in *Taft*. It held that the section 4(f)(2) exemption is available only if the employer can prove that there is no evasion of the *purposes* of the Act, that one of the principal purposes of the Act was to prohibit arbitrary age discrimination, and, therefore, that a mandatory early retirement provision "must have some economic or business purpose" independent of age if it is not to be considered a subterfuge. 542 F.2d at 221.

REASONS FOR GRANTING THE WRIT

I. THE DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

The decisions of other circuit courts on the lawfulness of mandatory early retirement plans are clearly in conflict with that of the Fourth Circuit in this case. In *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974), the Fifth Circuit held that mandatory retirement of an employee at age 60 pursuant to a profit sharing retirement plan did not violate the Act. In holding that the employer's action was exempted by section 4(f)(2), the court disposed of the argument that

[2] McMann v. United AirLines, Inc., 542 F.2d 217 (4th Cir. 1976).

Taft's plan was a subterfuge for age discrimination by noting that it was adopted "far in advance of the enactment of the law." 500 F.2d at 215. The Fifth Circuit was similarly unimpressed with the arguments that Congress had intended to limit the section 4(f)(2) exemption to situations in which employers could show undue hardship and that the exemption required the rehiring of individuals lawfully retired pursuant to its terms. The Fifth Circuit declared there were several reasons for rejecting the first argument, but "[t]he primary difficulty is that it attempts to use legislative history to *override* the unambiguous language of the statute." *Id.* at 217. As for the second argument, the Court declared that, "[i]f retired employees must be rehired immediately, the right to insist on compliance with a plan is an illusion. Congress could not have possibly intended, or directed, such a contradictory, irreconcilable result." *Id.* at 218.

In the instant case, the Fourth Circuit disagreed with each of the conclusions of the Fifth Circuit. It held that mandatory early retirement plans adopted before as well as after the Act are unlawful absent a showing of special economic or business justification[3] and that Congress did not intend section 4(f)(2) "ever to excuse

[3] The *amicus* agrees with the Fourth Circuit's view that section 4(f)(2) should not be construed as treating plans adopted prior to the Act differently from those adopted subsequent thereto. It submits that the proper interpretation is that contained in the published interpretations of the Secretary of Labor and the initial opinions of the Wage and Hour Administrator which permit post- as well as pre-Act plans to provide for mandatory early retirement. See 29 C.F.R. § 860.110 (1976), published at 33 Fed. Reg. 12227-28 (1968) and 34 Fed. Reg. 322 (1969); *e.g.*, ADEA Opinions, Wage and Hour Administrator Clarence T. Lundquist, August 14, 1968, September 6, 1968, and November 15, 1968; ADEA Opinions, Acting Wage and Hour Administrator Ben P. Robertson, April 29, 1969 and April 16, 1970; ADEA Opinion, Wage and Hour Assistant Administrator Francis J. Costello, June 29, 1971.

the failure to hire *or the discharge* of any individual . . . " 542 F.2d at 221.

In *de Loraine* v. *MEBA Pension Trust,* 499 F.2d 49 (2d Cir.), *cert. denied,* 419 U.S. 1009 (1974), the Second Circuit held that section 4(f)(2) permitted the involuntary termination of an individual prior to age 65 pursuant to a pension trust. The Court declared that since the trust was established long before ADEA was enacted and "*pays substantial benefits to a broad class of workers* . . . , the Trust is certainly not itself a subterfuge to evade the purposes of the statute." 499 F.2d at 50. (emphasis added).

It is true, as noted by the Fourth Circuit, 542 F.2d at 220 n.5, that the Second Circuit in *de Loraine* stated that it was declining to consider an argument made by an *amicus curiae* that the ADEA prohibits all involuntary retirement pursuant to a pension plan before age 65.[4] However, resolution of that issue favorably to the trust in *de Loraine* seems clearly to have been part of the court's conclusion that section 4(f)(2) authorized the employee's termination at age 52. Certainly, the Second and Fourth Circuits are in direct conflict on the question of whether an early retirement plan adopted before enactment of ADEA and providing substantial benefits can be a subterfuge to evade the *purposes* of the Act.[5]

The decision of the Fourth Circuit in *McMann* also conflicts with the action of the Ninth Circuit in affirming a lower court decision which had ruled that section

[4] The Second Circuit pointed out that "plaintiff did not take this position in the district court." 499 F.2d at 51 n.7.

[5] *Compare* 499 F.2d at 50-51 *with* 542 F.2d at 219-21.

4(f)(2) authorized involuntary termination at age 56 pursuant to a mandatory retirement plan adopted before the enactment of ADEA. *Steiner* v. *National League of Professional Baseball Clubs,* 377 F. Supp. 945 (C.D. Cal. 1974), *aff'd,* No. 74-2604 (9th Cir. Oct. 15, 1975). While the Ninth Circuit did not issue an opinion with its affirmance,[6] in a recent Title VII case, that court observed that in section 4(f)(2), "Congress did expressly exempt actuarially based pension and retirement funds from the provisions of the [ADEA]".[7]

II. THE DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT[8]

The Fourth Circuit held that in order for involuntary retirement prior to age 65 to be considered authorized by section 4(f)(2), "*the employer* must demonstrate that . . . [its] plan is not being *maintained* as a subterfuge to evade the Act . . . " 542 F.2d at 221 (first

[6] A copy of the Order of Affirmance is in the Appendix at 1a. Rule 21(c) of the Ninth Circuit provides that such "disposition . . . shall not be cited to or by this court for any district court of the Ninth Circuit," with certain exceptions not here relevant.

[7] Manhart v. Los Angeles, Nos. 75-2729, 75-2807 and 75-2905, 13 FEP Cases 1625, 1632 (9th Cir. Nov. 23, 1976).

[8] The *amicus* also adopts petitioner's contention that the Fourth Circuit's decision, *see* 542 F.2d at 219-20 n. 4 and 222 n. 6, conflicts with applicable decisions of this Court in rejecting contemporaneous administratve interpretations and opinions (see note 3, *supra*), in favor of the advocative position advanced for the Secretary of Labor in an *amicus* brief. *See, e.g.,* General Electric Co. v. Gilbert, Nos. 74-1589 and 74-1590, 45 U.S.L.W. 4031, 4036 (U. S. Dec. 7, 1976); United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 858-59 n. 25 (1975). The *amicus* also notes that the Secretary's "revised" position, filed with the Fourth Circuit on February 4, 1976, has not yet been reflected in any change in the published regulations.

emphasis added.) Under this construction, to qualify for the protection of the statutory exemption, the employer must prove the negative element of the exemption (the non-existence of a subterfuge) as well as prove the positive element (the "bona fides" of its retirement plan.)

Such an approach clearly conflicts with decisions of this court allocating the burden of proof in comparable situations under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-e (1970).

For example, in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), the Court described the order of proof where an employer sought to utilize the exemption in section 703(h) to defend its use of a personnel test which had a discriminatory effect on minority applicants. That exemption applies to actions based upon the results of a professionally developed ability test, provided that such test or action based thereon "is not designed, intended or used to discriminate because of race . . ." 42 U.S.C. § 2000e-2(h) (1970). In the court's view, employers have the burden of establishing through professional validation studies whether their employment tests are job-related. 422 U.S. at 430-31. However, if an employer meets this burden, "it remains to the complaining party to show that other tests . . . without a similarly undesirable racial effect would also serve the employer's legitimate interest . . . Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination. *Id.* at 425.

McDonnell Douglas Corp. v. *Green,* 411 U.S. 792 (1973), also placed the burden on the complaining party to show that the employer's justification for a challenged practice was a pretext for discrimination and that case was cited as authority for the above quoted statements in *Albemarle Paper.*

The court's recent opinion in *General Electric Co.,* v. *Gilbert,* Nos. 74-1589 and 74-1590, 45 U.S.L.W. 4031, 4034 (U.S. Dec. 7, 1976) makes clear that in employment discrimination cases, the words "pretext" and "subterfuge" are considered to be synonymous.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT [9]

The Secretary of Labor in his *amicus* brief to the Fourth Circuit acknowledged that this case is "one of basic importance to the administration and enforcement of Act".[10] In his 1975 annual report to Congress pursuant to section 13 of the Act, the Secretary noted the holding in *Brennan* v. *Taft Broadcasting Co.,* 500 F.2d 212 (5th Cir. 1974), and stated that the Department of Labor would seek "to develop a conflict with this opinion in another circuit." [11] The decision below is the fruition of the Secretary's efforts.

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[9] In Massachusetts Board of Retirement v. Murgia, No. 74-1044, 96 S.Ct. 2562 (June 25, 1976), this Court upheld the action of a State in mandatorily retiring its uniformed police at age 50, but the ADEA was not raised in that case.

[10] Brief for the Secretary of Labor as *Amicus Curiae* at 4, McMann v. United Air Lines, Inc., No. 75-2206 (4th Cir. filed Feb. 4, 1976.)

[11] U. S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, *Age Discrimination in Employment Act of 1967,* at 17 (Jan. 31, 1975) (A report covering activities under the Act during 1974 submitted to Congress in 1975 in accordance with section 13 of the Act).

The Fourth Circuit's conclusion that "there must be some reason other than age for a plan, or a provision of a plan, which discriminates between employees of different ages", 542 F.2d at 220, effectively precludes mandatory retirement of employees prior to age 65 in most cases. Few employers would be able to *prove* that some "economic or business purpose" required retirement at a particular age. *See id.* at 221. Moreover, the reasoning of the court also makes suspect the numerous other provisions of employee benefit plans which frequently differentiate on the basis of age, such as vesting provisions, benefit payment formula, funding provisions and premium payments for insurance and health plans.

It has been authoritatively recognized that mandatory retirement provisions in pension plans provide employers flexibility in personnel management to meet special conditions in particular industries,[12] and also to attract and advance younger employees.[13]

Congress also has recognized the importance to employers of the option of mandatory retirement by consistently refraining from infringing on the availability

[12] REPORT OF THE PRESIDENT'S COMMISSION ON CORPORATE PENSION FUNDS AND OTHER PRIVATE RETIREMENT AND WELFARE PROGRAMS ix, 24 (Jan. 1965). In 1971, 58% of all workers were covered by pension plans which contained mandatory retirement provisions. H.E. Davis, *Pension Provisions Affecting The Employment of Older Workers*, 69 MONTHLY LABOR REV. 41, 42 (April 1973).

[13] H.R. Rep. No. 93-98, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News 1396, 1398-1401; see TAGGART, THE LABOR MARKET IMPACTS OF THE PRIVATE RETIREMENT SYSTEM 8 (Feb. 21, 1973) (A Dissertation prepared for Manpower Administration, distributed by National Technical Information Service, U.S. Department of Commerce).

of this management prerogative. In 1964, Congress declined to include "age" as a Title VII protected category because "it is absolutely impossible to predict what impact this [provision] would have" on industrial group insurance and pension plans.[14] In 1967, in enacting the ADEA, Congress included section 4(f)(2) to expressly exempt not only mandatory retirement provisions, as the Administration bill had done,[15] but all age-related provisions in employee benefit plans.[16] Fur-

[14] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND IX OF CIVIL RIGHTS ACT OF 1964, at 3174 (1968).

[15] The Administration bill contained the following exemption:

> It shall not be unlawful for an employer . . . to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act. . . .

S. 830, 90th Cong., 1st Sess. § 4(f)(2)(1967).

Secretary Wirtz testified at the Senate Hearings on the effect of this exemption:

> [T]he effect of the provision in section 4(f)(2) which appears on page 6 *is to protect the application of almost all plans which I know anything about.*
>
> • • •
>
> *It is intended to protect retirement plans.*

Hearings on S. 830 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 53 (1967) (emphasis added).

[16] Senator Javits introduced an amendment that led to the additional language presently in section 4(f)(2) with the following remarks:

> *The Administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem.*
>
> • • •
>
> I have prepared and will introduce today a series of amendments to the Administration's bill, which I believe will meet these various problems, *while retaining the most desirable*

ther, Congress also included section 5 in the ADEA, requiring the Secretary to study "institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations . . . ," 29 U.S.C. § 624 (1970), a meaningless requirement if involuntary retirement had been prohibited by the immediately preceding section of the Act.

Finally, it should be noted that the recently enacted Employee Retirement Income Security Act (ERISA), Pub. L. 93-406, 88 Stat. 829 (1974), requires employee benefit plans to conform with many age-related standards.[17] The ruling of the Fourth Circuit thus creates serious confusion for those planning and administering employee benefit programs when they attempt to square their responsibilities under ERISA with the Fourth Circuit's view of the ADEA.

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features of the Administration's bill, and of S. 788. Let me briefly describe them:

• • •

Third, that *a fairly broad exemption* has been provided for bona fide retirement and seniority systems. As I previously noted, *S. 830 contains only a limited exemption for retirement systems* and no exemption for seniority systems.

113 Cong. Rec. 7076 (1967) (emphasis added).

[17] *E.g.*, vesting may be dependent in part on an employee's age, ERISA § 203(a)(2)(C)(i), 29 U.S.C. § 1053(a)(2)(C)(i) (Supp. IV 1974); "normal" retirement age may be before age 65, ERISA § 3(24), 29 U.S.C. § 1002(24) (Supp. IV 1974); benefit payments may begin on the earlier of the 65th birthday or normal retirement, ERISA § 206(a)(1), 29 U.S.C. § 1056(a)(1) (Supp. IV 1974); age 55 is the base age for determining maximum allowable annual benefits, ERISA § 2004(a)(2)(C), 26 U.S.C. § 415(b)(2)(C) (Supp. IV 1974).

CONCLUSION

A writ of certiorari should be granted at this time because the decision below has a final and irreparable effect on the rights of the parties. *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 545 (1949). The issue presented is fundamental to the further conduct of the case. *United States* v. *General Motors Corp.* 323 U.S. 373, 377 (1944). If the case goes forward to trial in its present posture, the employer will be required to carry a burden of proof in conflict with applicable decisions of this Court. The cost and inconvenience of trying the case with these questions unanswered will be much greater than any inconvenience of review at this time. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964). Also, if the decision below is not quickly reviewed, employers with employees in each of the circuits in conflict will be unsure of the validity of pension plan provisions covering all such employees.

For the reasons stated herein, the Chamber of Commerce of the United States of America urges that this Court grant the petition for certiorari to review the judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

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United States Court of Appeals for the Ninth Circuit

MELVIN STEINER, *Plaintiff-Appellant,* vs. NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS, CHARLES FEENEY, as President of the National League of Baseball Clubs, *Defendants-Appellees.*	No. 74-2604 **Order**

[October 15, 1975]

Appeal from the United States District Court
for the Central District of California

Before: BROWNING and SNEED, Circuit Judges, and RENFREW,* District Judge

The judgment is affirmed for the reasons stated by the district court. *See* 377 F. Supp. 945 (C.D. Cal. 1974).

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* Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.